

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



V

**Everlasting Capital Corp**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages/commissions  
RSA 275:43 V unpaid vacation pay

**Employer:** Everlasting Capital Corp, 27B Sterling Dr, Rochester NH 03867

**Date of Hearing:** May 23, 2016

**Case No.:** 52504

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts he is owed \$8,080 in unpaid commissions for sales made during May 2015. He also seeks \$600 in unpaid vacation pay due upon his separation.

The employer denies the claimant was not paid for all commissions and vacation pay due. The employer had verbally reduced his commission from 30% to 10%, due to his previous performance, for the month of June 2015. As his performance improved, the employer returned his commission payout to 30% in July 2015.

The claimant used thirty-eight vacation days, more than his allotment, and further, the written policy states vacation days are not paid out upon separation.

**FINDINGS OF FACT**

The claimant worked for the employer with an agreement for \$30,000 annual salary and 30% commission payout on sales.

The claimant argues he did not receive his full commission for May 2015. He estimates the amount due at \$8,080, though he was unclear on exact figures. He has no recollection of any meeting with the employer regarding his performance or change in commission structure.

The employer argues William Murphy and Joshua Feinberg both had a meeting with the claimant at the end of May 2015, because he was not bringing in new customers, only selling to existing customers, in contravention of his agreement. They introduced a performance improvement plan (PIP) which required the claimant to have a mixture of 15% new customer sales and 85% existing customer sales. They also reduced his commission from 30% to 10%. Neither the PIP nor the reduction in commission was reduced to writing.

The employer paid the 10% commission reduction on only two sales, Perfection and ABC Disposal. The reduction lasted only one month, as the claimant increased his new customer sales to the requested amount and the employer reinstated his 30% commission payout.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer failed to reduce the reduction in commission to writing, however, that does not mean the claimant automatically prevails. Both members of the employer provided credible testimony that the meeting occurred and they verbally notified the claimant of the change in commission structure. The outcome of the meeting did result in a greater number of sales to new clients following the meeting, an increase of almost 40% more new client sales than existing customer sales.

The Hearing Officer does not find the claimant's argument that he does not recall the May 2015 meeting persuasive.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed commissions.

The claimant argues he is due \$600.00 for two weeks of vacation pay due upon separation from employment in February 2016.

The employer argues the claimant used thirty-eight days of vacation. Further, he signed an employment agreement on May 27, 2014, that states in relevant part, "Vacation days can not be cashed out and paid upon termination."

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding vacation pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer previously provided documentation to show they had notified the claimant of the written policy and maintained on file the claimant's signed notification.

The claimant vehemently argues that he is unable to tell if the signature on the May 27, 2014, agreement is his unless the employer shows him the original document. He argues he never saw the agreement and does not recall signing it. He further argues the signature on the agreement does not match the signature on the copy of the wage claim he agrees that he signed.

The Hearing Officer does not find the claimant's argument that he does not recall signing the agreement or that the signature is not his, persuasive.

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed vacation pay under the employer's written policy.

### **DISCUSSION**

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that his assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant failed to meet his burden in this claim.

Both parties provided testimony regarding the claimant's departure from the company in February 2016. This event clearly was still at issue for everyone involved, however, the events of that day have no bearing on the issues being heard at this hearing. Further any claims arising out of that event are not within the jurisdiction of this Department.

### **DECISION**

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed commissions/wages, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any vacation pay, it is hereby ruled that this portion of the Wage Claim is invalid.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: June 13, 2016

Original: Claimant  
cc: Employer  
Attorney

MJD/aph